IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DIANE M. SILVIOTTI	:	**CIVIL ACTION**
	:	
v.	:	
	:	
THE MORNING CALL, INC.	:	**NO. 01-4692**

M E M O R A N D U M

Waldman, J. **December 12, 2002**

I. Introduction

Plaintiff has asserted a claim under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 et seq. Plaintiff alleges that defendant discriminated against her because of her disability when it failed to accommodate her and ultimately terminated her employment.

Presently before this court is defendant's motion for summary judgment. Defendant asserts that plaintiff was an independent contractor and not an "employee" within the scope of the ADA, and has in any event failed to present competent evidence from which one could reasonably find that defendant discriminated against her because of her disability.

II. Legal Standard

In considering a motion for summary judgment, the court must determine whether "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment

as a matter of law." Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); Arnold Pontiac-GMC, Inc. v. General Motors Corp., 786 F.2d 564, 568 (3d Cir. 1986). Only facts that may affect the outcome are "material." Anderson, 477 U.S. at 248. All reasonable inferences from the record are drawn in favor of the non-movant. See id. at 256.

Although the movant has the initial burden of demonstrating the absence of genuine issues of material fact, the non-movant must then establish the existence of each element on which it bears the burden of proof. See J.F. Feeser, Inc. v. Serv-A-Portion, Inc., 909 F.2d 1524, 1531 (3d Cir. 1990)(citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)), cert. denied, 499 U.S. 921 (1991). A plaintiff cannot avert summary judgment with speculation or by resting on the allegations in the pleadings, but rather, must present competent evidence from which a jury could reasonably fund in its favor. Anderson, 477 U.S. at 248; Ridgewood Bd. of Educ. v. N.E. for M.E., 172 F.3d 238, 252 (3d Cir. 1999); Williams v. Borough of West Chester, 891 F.2d 458, 460 (3d Cir. 1989).

III. Facts

While the parties understandably seek to draw different conclusions from the record, there is virtually no dispute as to the relevant facts. From the competent evidence of record as

essentially uncontroverted, or otherwise viewed in the light most favorable to plaintiff, the pertinent facts are as follow.

Defendant operates a daily newspaper in Allentown, Pennsylvania. It has a bureau in Easton, Pennsylvania. Defendant engaged plaintiff to provide services for its Easton Bureau from August 1991 until July 30, 1999 when defendant terminated the relationship. Throughout this period, plaintiff rewrote press releases submitted by community organizations and civic groups for publication. She also wrote a feature article and an op-ed column on June 19, 1999.

Plaintiff suffers from cerebral palsy. She was diagnosed with the neurological disorder at age two. She walks and speaks with difficulty. She has no use of her left arm and is limited to the use of three fingers on her right hand. Plaintiff can operate a motor vehicle with appropriate modifications. She experiences fatigue with prolonged activity.

Plaintiff began working for defendant as a writer in August 1991. She wrote pieces for the weekly "Neighbors" section of the newspaper based on press releases submitted by local groups and organizations. On December 24, 1992, plaintiff and defendant executed a "letter agreement" formalizing their relationship.

The agreement provided that plaintiff would undertake certain writing assignments "as an independent contractor" and

that plaintiff was a "self-employed independent contractor and not an agent or employee of the Morning Call." The agreement provided that plaintiff was responsible for all expenses incurred in connection with completing her assignments and for payment of all appropriate taxes. The agreement did not obligate defendant to publish any of plaintiff's work and defendant was free to edit or change any submission. Defendant had first-time publication rights to plaintiff's submissions, but plaintiff was free to sell her work to any publication outside the Lehigh Valley and to those within the Lehigh Valley that were not direct competitors of defendant. The term of the agreement was one year and it was automatically renewed unless and until terminated by either party on thirty days notice. Plaintiff has acknowledged that throughout this period, defendant regarded and treated her as an independent contractor.

From August 1991 to mid-1996, plaintiff worked in the Morning Call Easton Bureau newsroom. During this period, both staff writers and freelance writers were permitted to use the newsroom. With assistance from the Pennsylvania Office of Vocational Rehabilitation, defendant identified equipment which would help plaintiff perform her job. Defendant purchased for plaintiff's benefit a special device for opening mail, a computer keyboard with "sticky keys" to help plaintiff type, an orthopedic chair, a tape recorder and a telephone headset.

In the summer of 1996, defendant's then editor, Jack Tobias, informed plaintiff and the other freelance writers that they could no longer use the newsroom offices or equipment, a move he deemed necessary to ensure that they retained the status of independent contractor. With assistance from the state, plaintiff then purchased a computer, modem and printer and rewrote press releases from her home. She could still use the newsroom copy machine and telephone as necessary, however, she made 95 percent of her telephone calls from her home.

Plaintiff made herself available on weekdays between 11 a.m. and 7 p.m. On average, she worked 28 hours per week. She would call or go to the newsroom to see if there were any press releases that required rewriting. Plaintiff would sometimes review press releases with her editor to determine the deadline by which some were to be rewritten and prioritized the remainder herself. She would then return home and submit her finished versions to her editor via modem. If more press releases came in during the afternoon that were to be included in the following day's newspaper, plaintiff would make another trip to the newsroom, rewrite them from home and then return to the newsroom with the press releases that evening. On average, plaintiff received 15 press releases each day to rewrite. During this period plaintiff also contemplated opening her own public relations business.

Plaintiff was paid by defendant according to invoices she submitted specifying the dates on which she had performed "freelance news assistant work" for the Morning Call. In 1997, plaintiff began to receive a flat per diem fee for each day she was available to work. She received $200 per five-day week. When she was unavailable for a day, she would only bill defendant for $160. Defendant paid plaintiff a flat $100 fee for any feature story it published and $50 for other published articles or opinion pieces. Plaintiff was paid by defendant from a distinct non-payroll account.

Defendant issued to plaintiff each year an IRS 1099 form reflecting "non-employee compensation." Plaintiff paid her own social security and income taxes. Plaintiff declared that she was "self-employed" on her tax returns and deducted business expenses including home office, telephone and automobile expenses.

In July 1997, Robert Orenstein became the Easton Bureau editor. He was responsible for assigning plaintiff work and editing her submissions. He spent between six and eight hours per week editing plaintiff's work. Plaintiff's work often contained inaccurate or missing information and required considerable editing. Plaintiff acknowledged that her work contained such mistakes as typographical errors, incorrect telephone numbers and an absence of pertinent information. She

also acknowledged that she was not maintaining a writing style consistent with that of the Morning Call.

In June 1998, Mr. Orenstein had an annual review with his supervisor, Metro editor Dave Erdman. At this review, Mr. Orenstein told Mr. Erdman that editing plaintiff's work took too much of his time. Mr. Orenstein spoke with plaintiff about these difficulties informally on several occasions. He showed her the edited versions of her work as examples of how she could improve. About a year before plaintiff's termination, Mr. Orenstein told her that she would be terminated if the quality of her work did not improve.

In June 1999, Mr. Orenstein again met with Mr. Erdman for his annual review. Mr. Orenstein again complained that editing plaintiff's work required too much time. Mr. Erdman authorized him to find an alternative means of preparing press releases for publication. Mr. Orenstein did so and notified plaintiff on July 30, 1999 that her services were being terminated. He explained to her that he had to devote too much time to editing her work.

On December 9, 1997, a delivery man had dropped a heavy cabinet on plaintiff's legs. This resulted in a right foot fracture that required a cast for three months and bone chips in her left knee. Plaintiff now walks with a cane and has suffered from post-traumatic stress disorder. She also became incontinent

but did not share this information with anyone at work because she was embarrassed. As a result, it was more difficult for plaintiff to travel to and from the newsroom. She asked Mr. Orenstein if she could perform her work in the newsroom. Her request was denied because Mr. Orenstein was concerned about maintaining plaintiff's status as an independent contractor.

Plaintiff asked Mr. Orenstein if she could include her name and home address in her published press release columns so that issuers could send press releases directly to her and she would not have to make the trip to the newsroom. Mr. Orenstein denied this request for the reason that he needed to review the press releases first to assess which were suitable for publication. Plaintiff believed that working in her home exacerbated her post-traumatic stress disorder. In August 1998, plaintiff asked Mr. Orenstein if she could return to work in the newsroom because her apartment was very hot. Plaintiff stated that at the time she "was trying to buy an air conditioner" but "couldn't find one." The request was again denied.

Plaintiff filed an application for unemployment compensation benefits effective August 1, 1999. She was found to be ineligible for coverage because she was self-employed and her wages were derived from a non-employment relationship. She successfully appealed the decision and on December 20, 1999 her application for unemployment compensation was approved.

Plaintiff filed a claim with the EEOC on May 2, 2000. On June 11, 2001, the EEOC determined that it could not conclude from the information obtained in its investigation that there had been any statutory violation and issued a right to sue letter. It appears from correspondence between plaintiff's counsel and the EEOC that the agency's determination was based on its finding that plaintiff was not an "employee" of defendant.

IV. Discussion

The ADA encompasses only persons who are "employees." See Menkowitz v. Pottstown Memorial Medical Center, 154 F.3d 113, 122 (3d Cir. 1998); Birchem v. Knights of Columbus, 116 F.3d 310, 312 (8th Cir. 1997)(ADA does not encompass independent contractors). The burden is on a plaintiff to show that she falls within the scope of the statute. See E.E.O.C. v. Zippo Mfg. Co., 713 F.2d 32, 35 (3d Cir. 1983); Holtzman v. World Book Co., Inc., 174 F. Supp. 2d 251, 254 (E.D. Pa. 2001). Whether a worker is an "employee" within the meaning of the statute is a question of law to be determined by the court in the absence of disputed material underlying facts. See Cox v. Master Lock Co., 815 F. Supp. 844, 845 (E.D. Pa.), aff'd, 14 F.3d 46 (3d Cir. 1993). Neither the finding of the state unemployment compensation board nor the contrary finding of the EEOC regarding plaintiff's employment status are preclusive. See Roth v. Koppers Indus., Inc., 993 F.2d 1058, 1062 (3d Cir. 1993); Levitt

v. University of Texas at El Paso, 847 F.2d 221, 227 (5th Cir. 1988).

The ADA simply defines "employee" as "an individual employed by an employer." 42 U.S.C. § 1211(4). In the absence of a meaningful statutory definition, the Third Circuit had adopted the "hybrid test," combining the traditional common law "right to control" test with an "economic realities" test, to determine whether an individual is an employee or an independent contractor. See Zippo Mfg. Co., 713 F.2d at 38. The Supreme Court, however, has since held that when interpreting statutes in which Congress failed meaningfully to define the term "employee," the courts should employ the common law agency test identified in Community for Creative Non-Violence v. Reid, 490 U.S. 730, 751-52 (1989). See Nationwide Mut. Ins. Co. v, Darden, 503 U.S. 318, 323 (1992). It is thus this test which the court must employ. See Stouch v. Brothers of Order, 836 F. Supp. 1134, 1139 (E.D. Pa. 1993).

The pertinent factors in the common-law agency test include the purported employer's right to control the manner and means of the employment; the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects; the hired party's discretion over hours; the method of payment; the

hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and, the hired party's tax treatment. See Reid, 490 U.S. at 751-52 (citing the Restatement (Second) of Agency § 220(2)(1957)). Each factor must be weighed and no one factor is decisive, see id. at 751; Eisenberg v. Advance Relocation & Storage, Inc., 237 F.3d 111, 114 (2d Cir. 2000), although greater emphasis is given to the purported employer's right to control the manner and means of employment. See Alexander v. Rush North Shore Med. Ctr., 101 F.3d 487, 492 (7th Cir. 1996); Frankel v. Bally, Inc., 987 F.2d 86, 90 (2d Cir. 1993); Lattanzio v. Security Nat. Bank, 825 F. Supp. 86, 90 (E.D. Pa. 1993).

In an employment relationship, an employer has discretionary, routine control over the employee's daily activities. See Alexander, 101 F.3d at 493. Defendant did not control how or where plaintiff did her work. While defendant sometimes established a deadline for completion of work, plaintiff could perform the work at any time within any such deadline and could generally prioritize herself the order in which she did the work. Defendant did not supervise plaintiff's daily work activities. Her submissions were edited but the editorial process began only after plaintiff submitted her work to defendant for publication. See D.A.R.E. America v. Rolling

Stone Magazine, 101 F. Supp. 2d 1270, 1279 (C.D. Cal. 2000)(holding in assessment of respondeat superior liability in defamation case that editing of written submissions is not sufficient control to establish employee status); Hernandez v. Norris Square Civic Ass'n, 1995 U.S. Dist. Lexis 8427, *17 (E.D. Pa. June 13, 1995)(defendant's authority to make changes in plaintiff's work and set deadline for completion insufficient control to show plaintiff was employee).

While defendant had first-time publication rights, plaintiff could sell her work to any publication outside the Lehigh Valley and even to those within the region that were not direct competitors of defendant. That plaintiff may not have exercised this option does not alter the fact that she was largely free to write for most other publications. See Lattanzio, 825 F. Supp. at 89 (control does not arise from plaintiff's choice not to pursue other opportunities).

Defendant did not exercise the type of routine control ordinarily associated with employee status.

The task entrusted to plaintiff did not require unique skill or expertise. It also was not a task suitably entrusted to anyone with basic literacy or the various community press releases could have been published upon receipt as written. The task called for the type of journalistic training or skills and flair for phraseology one would reasonably expect from someone,

like plaintiff, with a degree in Communications. This factor does not point significantly in either direction.

Plaintiff worked from her home with equipment she purchased and maintained in a manner ordinarily associated with self-employment. The relationship was year to year but of eight years duration which favors plaintiff's position. Defendant did not have the right to assign plaintiff additional projects and did not do so. While plaintiff was free to submit additional pieces for possible publication, her assigned work was limited in nature and scope. This factor favors defendant's position.

Plaintiff had considerable discretion over hours. While plaintiff agreed to be available between 11 a.m. and 7 p.m. to retrieve press releases when needed, she was free within deadlines occasionally established to perform her work at any times she wished. In fact, plaintiff dedicated an average of 28 hours per week to her work for defendant. This factor does not suggest employee status.

Defendant did not pay plaintiff a salary or hourly wage. Plaintiff received a per diem fee based on invoices she submitted for days dedicated to "free-lance news-assistant work" and a flat fee for any articles published. The payment of a per diem fee regardless of the actual volume of work product can reasonably be likened to a salary. On the other hand, it is not uncommon for independent public relations or other consultants to

receive a daily, weekly or monthly fee during the period they are retained and available to consult even for days or weeks during which no actual service is rendered. The flat fee arrangement is totally consonant with a freelance or independent contractor status. This factor overall is ambiguous and does not meaningfully favor the position of either party.

There is no competent evidence of record to suggest plaintiff was precluded from engaging someone at her expense to assist her with various aspects of her work. There also is no evidence that she ever did so and thus one cannot confidently assess how any such arrangement would actually have been effectuated. This factor as a practical matter favors the position of neither party.

Defendant clearly was in business and engaged plaintiff to perform work which was part of its regular business. This is consistent with employee status.

Plaintiff received no health, retirement or other employee benefits of any kind. She received no vacation, holiday, personal or sick leave. This is highly inconsistent with employee status.

Plaintiff was treated as an independent contractor for tax purposes. She received a Form 1099 for "non-employee compensation." No taxes or social security payments were withheld from her paychecks. Plaintiff declared herself to be

self-employed on her tax returns and took deductions for business expenses. This factor strongly militates in favor of an independent contractor status.

The parties expressly provided in a written agreement that plaintiff was an independent contractor. Although such contract language is not determinative, it provides strong evidence of plaintiff's status. See Holtzman, 174 F. Supp. 2d at 256. Plaintiff worked from her home with equipment she purchased and maintained. She had considerable discretion as to how and when she performed her work. Her daily work activities were not subject to supervision. She was free to perform work for others. She received no employee benefits. She had no social security or income taxes deducted. She declared herself to be self-employed on her tax returns and took deductions for expenses.

Plaintiff has not sustained her burden of showing she was an employee within the meaning of the ADA on the record presented. Based on the totality of pertinent factors, plaintiff must reasonably be held to be the independent contractor she represented herself to be.

Defendant argues with considerable force that plaintiff also has presented no competent evidence from which one could reasonably find that the stated legitimate reason for her termination of unacceptable performance and a resulting need for an inordinate amount of editing time was pretextual.

Defendant argues with similar force that there is no competent evidence of record from which one could reasonably find plaintiff's work product would have meaningfully improved and the need for excessive editing been obviated if one of her two daily trips to the newsroom had been eliminated or if all press releases were sent directly by the issuers to her prior to an editorial assessment of newsworthiness. It is difficult to view as unreasonable Mr. Orenstein's conclusion that assigning work space to plaintiff in the newsroom could have effectively altered her status as an independent contractor. It is difficult to discern any effective reasonable accommodation which was realistically possible in the circumstances that could have been implemented with any amount of interaction.

As plaintiff was not an employee within the ambit of the ADA, however, it is unnecessary definitively to address the substance of her claim as if she were.

V. Conclusion

The court cannot conscientiously conclude on the record presented that plaintiff was an employee within the ambit of the ADA. Defendant is thus entitled to summary judgment. Accordingly, defendant's motion will be granted. An appropriate order will be entered.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DIANE M. SILVIOTTI	:	**CIVIL ACTION**
	:	
v.	:	
	:	
THE MORNING CALL, INC.	:	**NO. 01-4692**

O R D E R

AND NOW, this day of December, 2002, upon consideration of defendant's Motion for Summary Judgment (Doc. #9) and plaintiff's response thereto, consistent with the accompanying memorandum, **IT IS HEREBY ORDERED** that said Motion is **GRANTED** and accordingly **JUDGMENT** is **ENTERED** in the above action for the defendant.

BY THE COURT:

_____
JAY C. WALDMAN, J.